Supreme Court, U.S.
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No. 92-1598

In The

Supreme Court of the United States

October Term, 1992

THOMAS W. CURLEY,

Petitioner,

-against-

CONSOLIDATED RAIL CORPORATION and EXCELSIOR TRUCK LEASING COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The New York Court Of Appeals

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a jury verdict in a Federal Employers' Liability Act lawsuit based on **total speculation** sustainable?

2. Is a railroad an insurer of the safety of its employees requiring the finding of liability merely because an accident occurred?

3. Since Petitioner fails to raise any novel or undecided question of federal law and the Courts Below based their respective decisions on the analysis of the evidence in the case, should the Supreme Court of the United States grant the Petition for a Writ of Certiorari?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PRELIMINARY STATEMENT[1]

Petitioner THOMAS W. CURLEY seeks a Writ of Certiorari to the Court of Appeals of the State of New York from an Order of said Court entered on December 21, 1992, which affirmed by a five to one vote the dismissal of the Petitioner's Complaint and the reversal of a Judgment entered by the lower Court in favor of the Petitioner.

The Court of Appeals of the State of New York, by a five to one vote and the Appellate Division First Department of the State of New York, by a four to one vote, found that Petitioner, at trial, had failed to make a prima facie case. Petitioner failed to produce evidence sufficient as a matter of law that any negligent act or omission on the part of Respondent CONSOLIDATED RAIL CORPORATION caused Petitioner's injuries.

The Supreme Court of the United States should not grant the Petitioner's Writ of Certiorari. Petitioner, in an attempt to create a federal question, erroneously claims that the Courts Below[2] in their opinions disregarded the

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[1] Pursuant to Rule 29.1, a list of the related corporations of the Respondent CONSOLIDATED RAIL CORPORATION is annexed hereto as Appendix A.

[2] As used in this brief, "Courts Below" refers to the Court of Appeals of the State of New York and the Appellate Division First Department of the State of New York.

Congressional intent in enacting the Federal Employers' Liability Act. (Petition P. 31.) However, the Courts Below, after properly reviewing the applicable case law, the statutory law and the evidence adduced at trial, rejected Petitioner's claim and ruled that under federal law, Petitioner had failed to provide sufficient evidence to prove that Respondent CONSOLIDATED RAIL CORPORATION's negligence was a cause of Petitioner's injuries. Congress, in enacting the Federal Employers' Liability Act did not intend to hold an employer absolutely liable for any and all injuries to its employees. Petitioner failed to establish that Respondent CONSOLIDATED RAIL CORPORATION's negligence played any part, no matter how slight, in causing Petitioner's injuries.

Since Petitioner has failed to assert any federal questions, Petitioner's Writ of Certiorari must not be granted. Furthermore, Petitioner's Writ of Certiorari should be denied, because the issues before the Supreme Court are merely factual ones which would be of no importance except to the litigants themselves.

Petitioner's basic argument is that there was sufficient evidence to establish causation as to Respondent CONSOLIDATED RAIL CORPORATION's alleged negligence. Issues relating to sufficiency of evidence are factual, therefore the Supreme Court of the United States should not review such factual findings. The majority of the justices of the Appellate Division First Department having heard the evidence concluded that there was not enough evidence supporting Petitioner's claim; the Court of Appeals reached the same result. It would be improvident for the Supreme Court of the United States to grant

the Writ of Certiorari since the issues to be placed before this Court are merely factual ones.

STATEMENT OF THE CASE

On March 6, 1984, Petitioner Thomas W. Curley was employed by Respondent CONSOLIDATED RAIL CORPORATION as a police officer. Petitioner alleges that he was on routine patrol in Rockland County, New York and was driving a 1981 Ford LTD automobile owned by Respondent EXCELSIOR TRUCK LEASING COMPANY which was leased to Respondent CONSOLIDATED RAIL CORPORATION. The vehicle was designated as Car 360 ("the Car") by Respondent CONSOLIDATED RAIL CORPORATION.

At trial, Petitioner testified that he was traveling at approximately 40 miles per hour immediately before the alleged occurrence. Petitioner further testified that prior to the accident he did not hear anything or feel anything unusual as he was driving Car 360. Petitioner states that there was a sudden deceleration of the Car, the Car skidded and then rolled to a stop on the side of the highway. The Car did not come into contact with any objects. The Petitioner incredulously claimed to be thrown forward with such force as to herniate two (2) discs in his lower back.[3]

[3] The disinterested testimony of Mr. Thomas Shaw, an engineer and automotive expert from The Ford Motor Company, was that in his opinion, such was impossible.

Petitioner adduced no evidence at trial as to why and how the car made the alleged abrupt stop. In fact, Petitioner's attorney at trial commenting on the cause of the accident in his summation stated that "it could have been anything that happened." The evidence disclosed neither a defect in the vehicle nor any mechanical problem with Car 360. Petitioner did not provide any expert testimony as to the cause of the accident.

The Petitioner, thereafter, commenced this action in negligence alleging that Respondent had violated the Federal Employers Liability Act. The Respondent CONSOLIDATED RAIL CORPORATION served its Answer and commenced a Third-Party Action against Respondent EXCELSIOR TRUCK LEASING COMPANY, the owner-lessor of the Car and against The Ford Motor Company, the manufacturer of the vehicle. The action against Ford was discontinued with prejudice prior to trial.

The testimony at trial demonstrated that maintenance was performed on Car 360 regularly, pursuant to a maintenance schedule and repairs were performed as needed by the agents of the Respondent EXCELSIOR TRUCK LEASING COMPANY.

The Petitioner offered absolutely no evidence that any specific or identified defect was present in Car 360. He offered absolutely no evidence of what caused the alleged movement of Car 360. To the contrary, Respondent CONSOLIDATED RAIL CORPORATION offered definitive evidence in the disinterested testimony of Thomas Shaw, an engineer employed by Ford Motor Company. Mr. Shaw testified that he was thoroughly familiar with the 1981 Ford LTD, the make and model of

the vehicle in question. Based upon the facts as testified to by Petitioner, Mr. Shaw was asked whether he had an opinion, with a reasonable degree of engineering certainty, as to the mechanical cause of the accident as claimed by Petitioner. Mr. Shaw testified that "there was no mechanical defect" and "there was no accident". Mr. Shaw also testified "that nothing would have slowed the car down like that".

Mr. Shaw categorically rejected Petitioner's total speculation as to why the alleged accident occurred. Petitioner testified that preceding the date of this incident, Petitioner had noticed that the car was making strange noises, seemingly coming from the area of the rear axle. Mr. Shaw testified that the axle could not have caused the car to slow down as alleged by the Petitioner. Based on his experience, Mr. Shaw testified that if the axle had locked, it would have stayed locked and would have been found to have been locked after the incident. However, the Petitioner testified that after the accident he had no problem moving the car forward and backward. Therefore, it is clear that since the axle did not continue to lock the axle could not have been the cause of the accident.

This evidence was left un-rebutted by Petitioner, although he had employed and retained an automotive expert. However, Petitioner never called his expert as a witness at trial.

Mr. Kenneth Kikta, who had forty (40) years experience as an automotive mechanic and who was employed as the Service Manager of Dan Buckeye Ford was subpoenaed by Respondent CONSOLIDATED RAIL CORPORATION

as a witness at trial. He examined Car 360 immediately after the claimed accident.

Mr. Kikta testified at trial, that he performed a number of tasks with regard to Car 360, including but not limited to disassembling the differential, examining the drive shaft, examining the brakes, and personally test driving Car 360. Mr. Kikta testified that after taking apart the drive train and examining it, as well as test driving the car, he could find no explanation for the vehicle allegedly coming to an abrupt stop, nor had he heard any noise coming from under the car. Mr. Kikta testified that after he conducted his full inspection of the car, he concluded that he could find no cause or explanation for the complaint regarding the movement of the car at the time of the alleged occurrence.

The aforementioned tests and inspections were performed within twenty-four (24) hours of Petitioner's alleged accident. Subsequent to the accident and prior to these tests and inspections by Mr. Kikta, no one performed any repairs on Car 360. At the time of Mr. Kikta's inspection and tests, Car 360 was in an identical condition as it was when the accident occurred on March 6, 1984. Mr. Kikta's compelling testimony illustrates that there was nothing wrong with Car 360. There was no evidence or indication that the Car came to a sudden stop or what would have caused the Car to come to a sudden stop.

In his Petition, the Petitioner admits he did not identify the cause of the Car acting as claimed, but opines it was fair to infer that the accident was caused by Respondent CONSOLIDATED RAIL CORPORATION using a

three (3) year old car or the alleged failure to check out complaints. Such total speculation is not enough to sustain a jury verdict. In fact, the evidence adduced at trial, through the documentary evidence of the maintenance records on Car 360 and the testimony of Douglas Mindek, Captain Albert Price and Captain Joseph Geng demonstrated that the Car was checked and repaired as necessary.

Incredulously, the jury returned a verdict for the Petitioner, found no comparative negligence on the part of Petitioner and found no liability on the part of the Respondent EXCELSIOR TRUCK LEASING COMPANY.[4] The record was devoid of any evidence of causation. The Courts Below correctly held that because of such, the evidence was insufficient as a matter of law to hold Respondent CONSOLIDATED RAIL CORPORATION liable and that Petitioner had failed to make out a prima facie case.

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[4] Respondent CONSOLIDATED RAIL CORPORATION asserted to the Appellate Division, First Department that the verdict was arrived at in whole or in part due to totally improper summation on the part of the Petitioner's trial attorney, including his giving unsworn testimony, expressing his own belief as to the facts, and reference to the "Bensonhurst thing" [a particularly troubling racial incident that occurred in Brooklyn, New York before the trial herein], when Respondent CONSOLIDATED RAIL CORPORATION's trial attorney was Black. The Courts Below did not address these issues as the Complaint was dismissed as a matter of law for failure to make a prima facie case.

REASONS FOR DENYING THE WRIT

At trial, Petitioner failed to establish a prima facie case against Respondent CONSOLIDATED RAIL CORPORATION because Petitioner failed to adduce evidence to causally connect in any way Petitioner's injury to any negligent act of the employer, CONSOLIDATED RAIL CORPORATION. A jury verdict based totally on speculation cannot stand. The Courts Below correctly relied on the Supreme Court holding in *Atchison Topeka and Santa Fe Ry. Co. v. Toops*, 281 U.S. 351 (1930). Post-*Toops* decisions of this Court did not erode the applicability of the *Toops* holding relied on in this case. Congress, in enacting the Federal Employers' Liability Act, did not intend to require Respondent CONSOLIDATED RAIL CORPORATION to act as an absolute insurer of any injuries sustained by its employees. To reverse the Court of Appeals of the State of New York in this matter would be to hold Respondent CONSOLIDATED RAIL CORPORATION liable for any and all injuries regardless of negligence or cause.

POINT I

PETITIONER FAILED TO PROVIDE SUFFICIENT EVIDENCE TO CAUSALLY CONNECT PETITIONER'S INJURY TO ANY NEGLIGENT ACT BY RESPONDENT CONSOLIDATED RAIL CORPORATION; THEREFORE, PETITIONER FAILED TO ESTABLISH A PRIMA FACIE CASE

The Complaint of the Petitioner herein was appropriately dismissed. The Petitioner, in attempting to convince this Court to grant a Writ of Certiorari, is pressing his contention that a jury verdict for the Petitioner should

stand even if it is based on total surmise, conjecture, assertions of hope and speculation. Such a contention is totally lacking in merit. Petitioner falsely asserts that the holding in *Toops*, is too broad and that the ruling relied upon by the Courts Below is nothing more than dicta.

In his Petition, Petitioner is repeating the same arguments that the vast majority of the judges of the Court of Appeals of the State of New York and the vast majority of the justices of Appellate Division First Department rejected. Petitioner repeats its claims that subsequent Supreme Court decisions have lessened the standard of review in Federal Employers' Liability Act cases and that the majority of the justices of the Appellate Courts neglected to abide by the rules set forth in post-*Toops* decisions. Petitioner further asserts that the majority of the justices of the Courts Below were irresponsible in not abiding to this Court's decision in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, *reh'g denied*, 353 U.S. 943 (1957). (Petition P. 27)

Respondent CONSOLIDATED RAIL CORPORATION is dismayed at Petitioner's claim that the majority of justices in the Courts Below did not carefully consider Petitioner's appeal and that the majority of the judges and justices of the Courts ignored the precedent Supreme Court cases regarding Federal Employers' Liability Act actions.

It is very evident from reading the decisions by the majority of the judges and justices of the Courts Below that they were fully aware of the standard of review required in actions brought under the Federal Employers' Liability Act. In their respective decisions, the Courts

Below correctly reiterated that the standard in Federal Employers' Liability Act actions is "whether the proofs justify *with reason* the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought". [Emphasis Added.] *Rogers, supra.* (See: Petition Pages A2 and A25)

Therefore, the Courts Below did not overlook or misapply any controlling principle of law relating to Federal Employers' Liability Act actions. The Courts were fully aware of the standard of review in Federal Employers' Liability Act cases.

Furthermore, Petitioner falsely asserts that in Federal Employers' Liability Act actions, a party does not have to produce sufficient evidence to causally connect Petitioner's injury to any negligent act of Respondent CONSOLIDATED RAIL CORPORATION. Also, Petitioner falsely contends that in Federal Employers' Liability Act actions, a jury's verdict can be based on total surmise, speculation and conjecture. Such contentions are a misinterpretation of the holding of this Court in *Toops* and the subsequent holdings by this Court.

The Petitioner spends much time in his Petition seeking to argue that the Courts Below erred in citing *Toops* and that the provisions of that case should be considered non-binding dicta. (Petition P. 18.)

The Supreme Court in *Toops* held:

> To recover under the Federal Employers' Liability Act, an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's

> injury. In a case under the Federal Employers' Liability Act, a court cannot allow a jury to **speculate** concerning the cause of an employee's injuries and must withhold or withdraw the employee's case from the jury unless evidence proves a basis for the reasonable inference that the employee's injury was caused by the employer's negligence. [Emphasis added.]

Id. at 354-355.

Respondent CONSOLIDATED RAIL CORPORATION is perplexed as to the Petitioner's meritless claim that subsequent to *Toops* the Supreme Court has held that a jury verdict can be based on total speculation, surmise or conjecture. The Petitioner relies on *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108 (1963); *Lavender v. Kurn*, 327 U.S. 645 (1946); *Schulz v. Pennsylvania R. Co.*, 350 U.S. 523 (1956); *Webb v. Illinois Central R. Co.*, 352 U.S. 512 (1957) for such a proposition. Petitioner ignores other case law which has held that there must be sufficient evidence to causally connect an employee's injury to any negligent act by the employer.

Courts have continued to hold that in Federal Employers' Liability Act actions, there must be a sufficient showing (i.e., more than a possibility) that a causal relation existed. In *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 32-33 (1943), Mr. Justice Murphy stated:

> Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. The essential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is

attacked. *Galloway v. United States*, 319 U.S. 372 (1943); *Atchison T. & S.F. Ry. Co. v. Toops*, 281 U.S. 351 (1930).

Furthermore, the Supreme Court in *Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943) affirmed the reversal of a jury verdict in a Federal Employers' Liability Act case. In *Brady*, Mr. Justice Reed stated:

> The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of the fact in this case, the jury. * * * When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims.

Id. at 479-480.

See also Fore v. Southern Ry. Co., 178 F.2d 349 (4th Cir. 1949).

In *Moore v. Chesapeake & O. Ry. Co.*, 340 U.S. 573 (1951), this Court, in an opinion by Mr. Justice Minton, held that evidence was insufficient to present a question for the jury as to whether defendant's engineer was negligent in making a sudden and unexpected stop, without warning, thereby causing plaintiff's decedent to be thrown from the footboard of an engine tender into the path of a train. The Court held that it was incumbent

upon plaintiff to prove negligence of defendant which caused the fatal accident and that speculation cannot supply place of proof. *Id.* at 578

Moreover, in *Kuberski v. New York Cent. R.R. Co.*, 359 F.2d 90 (2nd Cir. 1966), *cert. denied*, 386 U.S. 1036 (1967), the Court held that a railroad car inspector suing a railroad under the Federal Employers' Liability Act, for injuries sustained while inspecting cars, failed to sustain the burden of proving that employer's alleged negligence in failing to have a motor scooter supplied with door closing equipment accompany him at time of injury played any role whatsoever in producing the injuries sustained. The Court held that since the record is devoid of evidence tending to show that the equipment on which the plaintiff stepped was defective, the court should not sustain verdicts that can only be based on speculation. *Id.* at 93

Even more recently, the Supreme Court of the State of Nebraska in *Chapman v. Union Pacific Railroad*, 237 Neb. 617, 467 N.W.2d 388 (1991), sustained the trial court's directed verdict on Plaintiff's Federal Employers' Liability Act claim. The plaintiff had claimed that his injuries could have been reduced or prevented had the railroad installed a seatbelt shoulder harness in a particular motor vehicle. The Court, citing *Toops*, held that under the Federal Employers' Liability Act, the railroad was not liable for injuries sustained by a railroad employee.

In the Case at Bar, it is clear that the Court of Appeals of the State of New York, after careful consideration of all applicable case law, came to the conclusion that Petitioner had failed to satisfy the standard of review applicable to

Federal Employers' Liability Act actions. The Court of Appeals stated:

> Even under the "low and liberal" standard applicable to FELA cases (*Smith v. National R.R. Passenger Corp.*, 856 F.2d 467, 469 (2nd Cir. 1988), plaintiff's evidence is insufficient as a matter of law, without total speculation (*Atchison, Topeka & Santa Fe Ry. Co. v. Toops*, supra at 355) to permit the inference that any negligent act or omission on Conrail's part caused his injuries.

(Petition A.3)

Petitioner's claims are based solely on the fact that he was injured. However, the bare occurrence of an injury alone cannot provide evidence of negligence and proximate causation necessary to allow the case to go to the jury. *Kuberski* at 93; *See also Moore*, 340 U.S. at 577-578. Furthermore, an employee's own conclusory assertions of negligence, absent proof of specific facts, are insufficient to support a rational inference of negligence. *Hurley v. Patapsco & Back Rivers R.R. Co.*, 888 F.2d 327, 329 (4th Cir. 1989).

Petitioner at trial offered no specific evidence as to the cause of accident. Petitioner testified that Car 360 skidded and then rolled to a stop on the side of the highway. No other vehicles were involved. The car did not strike any objects. The accident was unwitnessed. The Petitioner was unable to give any specific reason, other than speculation, guess or conjecture as to the cause of the alleged accident. Petitioner's basis for alleging liability on the part of Respondent CONSOLIDATED RAIL CORPORATION is that he was injured.

Even Petitioner herein concedes and admits that Petitioner at trial could not identify the precise cause. In fact, Petitioner could not identify any cause for the alleged incident. (Petition P. 8.) Petitioner offered no evidence that he made any oral complaints to any of Respondent CONSOLIDATED RAIL CORPORATION's supervisory personnel concerning Car 360. The Petitioner offered no corroborative evidence of his self-serving claim that he had orally complained about rear noise on Car 360 to co-employees. However, Respondent CONSOLIDATED RAIL CORPORATION did provide corroborative evidence that neither Petitioner nor Officer Libruk made any oral complaints to their immediate supervisor. At the trial, Lieutenant Albert Price, who supervised both the Petitioner and Officer Libruk, testified that prior to March 6, 1984, neither the Petitioner nor Officer Libruk ever communicated any specific complaints with respect to Car 360.

As the Courts Below indicated, Petitioner's evidence primarily consisted of testimony that Car 360 allegedly had been frequently complained about and repaired, was three (3) years old and had allegedly had been driven many thousands of miles. Petitioner's failure to establish a prima facie case against Respondent CONSOLIDATED RAIL CORPORATION can be evidenced by Petitioner's testimony at trial as to the error free operation of the Car before and after the accident highlighted earlier.

In *Moody v. Marine Central Railroad Company,* 823 F.2d 693, 695-696 (1st Cir. 1987), the Court held that expert evidence is often required to establish a causal connection between the accident and some item of physical or mental injury unless the connection is a kind that would be

obvious to laymen, such as a broken leg from being struck by an automobile. (quoting 4 F. Harper, F. James & O. Gray, *The Law of Torts* § 20.2 2d ed. 1986).

This general principle is also stated by Prosser and Keeton.

> Where the conclusion [of causation] is not one within common knowledge, expert testimony may provide a sufficient basis for it, but in the absence of such testimony it may not be drawn.

W.P. Keeton, *The Law of Torts* 269 (5th ed. 1984) (footnotes omitted).

In the instant case, Petitioner asked the jury to speculate that the accident was caused by the alleged non-repair or the alleged defective condition of the car. Petitioner failed to introduce any expert witness to either testify as to the specific cause of the alleged incident or offer any evidence relating to any alleged defect in Car 360. Petitioner cannot even identify the part allegedly not repaired nor can he identify a defective condition.

Respondent CONSOLIDATED RAIL CORPORATION, on the other hand, offered expert testimony by Mr. Shaw, an engineer employed by Ford Motor Company, that the accident could not have occurred as alleged as a matter of engineering certainty and physical science. Furthermore, Mr. Kenneth Kikta definitively concluded that there was nothing wrong with Car 360 which would cause it to move in the fashion alleged by the Petitioner.

The Petitioner offered absolutely no evidence to the jury, either on his own or through his own witnesses that

any specific or identified defect caused the alleged movement of Car 360. Petitioner submitted no evidence to the jury to enable a determination that Respondent CONSOLIDATED RAIL CORPORATION's act or omissions were a proximate cause of this occurrence. The verdict in this matter was based on total speculation and could not stand. A jury finding based on total speculation is not sustainable. It was properly dismissed.

POINT II

POST-*TOOPS* DECISIONS SUCH AS *GALLICK, TENNANT, LAVENDER* AND *BASHAM* ARE DISTINGUISHABLE FROM THE CASE AT BAR

Petitioner mistakenly relies heavily on his belief that this case is no longer controlled by *Toops* and that post-*Toops* decisions should have been followed by the Courts Below. The post-*Toops* decisions relied on by Petitioner are easily distinguishable.

In the instant case, there is absolutely no evidence to justify the jury's determination that the employer's negligence played any role whatsoever in producing the harm the employee suffered. Petitioner's reliance on post-*Toops* decisions such as *Gallick, Tennant, Lavender* and *Basham v. Pennsylvania R. Co.*, 372 U.S. 699 (1963) is without merit. Inasmuch as these Federal Employers' Liability Act cases cited by the Petitioner are distinguishable from this case, this Court should deny Petitioner's Writ for Certiorari.

In *Lavender v. Kurn*, 327 U.S. 645 (1946), there were facts in the record to support the reasonable inference that decedent was struck and killed by a mail hook protruding from a train. However, it is interesting to note,

that in relying on *Lavender*, the Petitioner has failed to bring to this Court's attention, the quote which most nearly involves the facts in this case: " . . . when there is a complete absence of probative facts to support the conclusion reached," the jury finding is reversible. *Id.* at 653. In the instant case, the Courts Below held that there was a total lack of or absence of any probative facts on the issue of causation.

Similarly in *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108 (1963) an expert testified that stagnant, vermin infested pools, tend to attract and breed insects of the type which caused his injury. In the Case at Bar, Petitioner failed to submit any expert evidence establishing any facts upon which liability could be based.

Basham v. Pennsylvania R. Co., 372 U.S. 699 (1963) is also of no assistance to the Petitioner, because there was direct eyewitness testimony that the accident occurred as plaintiff claimed. Here, there was no eyewitness to the alleged accident that could confirm Petitioner's self-serving testimony as to how the alleged incident occurred.

Petitioner's reliance on *Tennant* is misplaced and in fact demonstrates that *Toops* is still good law. The Court therein, citing *Toops*, held that "mere speculation be not allowed to do duty for probative facts". *Tennant* at 32. In this case, the Courts Below found no probative facts and there was insufficient evidence to find any causal connection.

Petitioner has built a house by using speculation and conjecture. Petitioner relied on the jury speculation that there must have been something wrong with an unknown part of the vehicle which may have caused the accident.

This Court in its decisions in *Toops, Brady, Tennant,* and *Moore* have rejected the idea that jury verdicts based on total speculation, conjecture or surmise should be upheld. Petitioner has failed to present evidence from which the negligence and the causal relation could reasonably be inferred.

Therefore, because the evidence presented does not suggest the conclusion that employer negligence played any part, even the slightest, in producing the injury, the Petitioner's Writ of Certiorari should be denied and the decisions by the Courts Below should stand.

POINT III

CONGRESS DID NOT INTEND TO MAKE RESPONDENT CONSOLIDATED RAIL CORPORATION AN ABSOLUTE INSURER AGAINST PERSONAL INJURY DAMAGES SUFFERED BY ITS EMPLOYEES

This Court has made it clear in its decisions, that under the Federal Employers' Liability Act the employer is not an insurer and that the injured employee can recover only upon proof of negligence on the part of the employer which is the proximate cause of the injury to the employee. In *Wilkerson v. McCarthy,* 336 U.S. 53, 61 (1949), Mr. Justice Black said:

> Much of respondents' argument here is devoted to the proposition that the Federal Act does not make the railroad an absolute insurer against personal injury damages suffered by its employees. *That proposition is correct,* since the Act imposes liability only for negligent injuries. [Emphasis added.]

See *Myers v. Reading Co.,* 331 U.S. 477 (1947).

Furthermore, in *Heater v. Chesapeake & O. R. Co.*, 497 F.2d 1243, *cert. denied*, 419 U.S. 1013 (1974), the Court held that Federal Employers' Liability Act does not make the employer an insurer, and that to recover plaintiff must show causation.

Therefore, it is clear that Congress did not intend to make a railroad liable for any and all injuries to its employees. In order to recover, a railroad employee has a duty to provide probative proof of negligence and causation on the part of the employer. Respondent CONSOLIDATED RAIL CORPORATION is perplexed as to Petitioner's meritless claim that a railroad should be held liable just because an employee was injured. Such a theory would result in Respondent CONSOLIDATED RAIL CORPORATION to be held liable for any injuries to its employees. Congress in enacting Federal Employers' Liability Act, intended to hold an employer liable only if an employee provides sufficient evidence to causally connect his injury to any negligent act of the employer.

After careful examination of case law and statutory law, nine (9) of the eleven (11) justices hearing this case in the Courts Below held that Petitioner failed to provide sufficient evidence to prove causation. Petitioner, however, claims that the Courts Below were irresponsible in relying on *Toops* and the controlling case. Petitioner falsely accuses the judges and justices of the Courts Below in misapplying the controlling cases.

Respondent CONSOLIDATED RAIL CORPORATION is astonished at the harsh tone which the Petitioner has adopted to refer to the Courts Below throughout the

Petition. Petitioner's harsh tones can be found throughout the Petition. For example, on Page 29 Petitioner states that with this decision, the judges of the New York Court of Appeals were apparently mocking and defying the Supreme Court's authority. Furthermore, Petitioner states that the judges "trifled" with their obligations. Perhaps the Petitioner relies on these harsh tones, since he realizes the case law upon which he relies is uncompelling.

It is incomprehensible for the Petitioner to even suggest that the Judges defied the Supreme Court's authority and had failed to carefully consider this appeal. The Courts Below based their decisions on reviewing Supreme Court precedents such as *Rogers* and *Toops*. Therefore, it is clear that the Courts Below did not ignore Supreme Court precedents when they held that Petitioner had failed to establish a prima facie case against Respondent CONSOLIDATED RAIL CORPORATION.

CONCLUSION

FOR THESE REASONS, THIS COURT MUST DENY THE PETITION FOR A WRIT OF CERTIORARI AND PERMIT THE DECISION AND ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK TO STAND.

Respectfully submitted,

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April 28, 1993
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APPENDIX A

AFFILIATED CORPORATIONS OF THE DEFENDANT-RESPONDENT CONSOLIDATED RAILROAD CORPORATION

AKRON & BARBERTON BELT R.R. CO.

ALBANY PORT RAILROAD CORP.

BELT RAILWAY CO. OF CHICAGO

CALPRO COMPANY

CALUMET WESTERN RAILWAY CO.

CHICAGO & WESTERN INDIANA RWY. CO.

CRC PROPERTIES, INC.

CRR INDUSTRIES, INC.

INDIANA HARBOR BELT R.R. CO.

LAKEFRONT DOCK & R.R. TERM. CO.

MERCHANTS DESP. TRANS. CORP.

MONONGAHELA RAILWAY CO.

NICH., FAY., & GREENB. R.R. CO.

PENN CENTRAL COMMUNICATIONS CO.

PEORIA MIDWEST TRANSP. CORP.

PEORIA & PEKIN UNION RWY. CO.

PITTS., CHART., & YOUGH. RWY. CO.

RAILBOX COMPANY

RAILGON COMPANY

RAILROAD ASSOC. INSURANCE, LTD.

ST. LAWRENCE & ADIRON RWY. CO.

TRAILER TRAIN CO.

TRANSPORTATION DATA EXCHANGE, INC.

BLACK HAWK DEVELOPMENT, INC.

CG PROJECTS, INC.

CG LOCKPORT

CONCORD CANADA, INC.

CONCORD RESOURCES GROUP

CONRAIL MERCURY, INC.

CRR CREDIT CORP.

CRR INVESTMENTS, INC.

CR QUALITY SERVICES, INC.

CU ENERGY PARTNERSHIP LP

GENERAL AMERICAN INSURANCE CO.

INCINERATOR PROJ JOINT VENTURE

LAND ACQUISITION SERVICES, INC.

NY LAND ACQUISITION SERVICES, INC.

PD LAND SERVICES, INC.

SORETOX INC.

STABLEX CANADA, INC.

STABLEX FILTRATION, INC.